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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY¹

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 557-572) has not yet been reported. The prior opinion of the district court, and the opinion of this Court when the case was previously before this Court, are reported, respectively, in 111 F. Supp. 562 and 347 U.S. 514.

JURISDICTION

The final judgment of the district court on remand was entered on February 27, 1961. The notice of

¹Pursuant to this Court's order of January 15, 1962, the United States is filing separate briefs in this case with respect to the two appellees, The Borden Company and the Bowman Dairy Company.

appeal was filed on April 28, 1961, and this Court noted probable jurisdiction on December 4, 1961. 368 U.S. 924. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended.

STATUTE INVOLVED

The pertinent provisions of Sections 2(a) and 2(b) of the Act of October 15, 1914, 38 Stat. 730, as amended, 49 Stat. 1526 (15 U.S.C. 13(a) and 13(b)), commonly known as the Clayton Act, are as follows:

SEC. 2(a). It shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.

SEC. 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services of facilities furnished, the burden of re-

butting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section * * *.

QUESTION PRESENTED

Whether a seller who discriminates in price in favor of chain stores, as such, can cost-justify the discrimination simply by showing that the average cost of sales and delivery to all chain stores is lower than the average cost of sales and delivery to broad groups of independent stores.

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing a government civil antitrust suit which charged The Borden Company and the Bowman Dairy Company, the two largest dairies in the Chicago, Illinois, area, with illegal price discrimination in violation of Section 2(a) of the Clayton Act. The district court found that the appellees' prices were discriminatory and constituted "prima facie violations of section 2(a)" (R. 563). It ruled, however, that the companies had established that such discriminations were justified by differences in cost (R. 570) under the proviso to Section 2(a) which permits price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such [different] purchasers sold or delivered."

On January 15, 1962, on motions filed by the appellees, this Court ordered separate hearings and the

filing of separate briefs on the merits for each of the appellees. This brief deals with appellee Borden, but the basic issues are common to both appellees.

THE BACKGROUND OF THE DECISION BELOW

The complaint in this case, filed in 1951, charged the defendants with violating Sections 1 and 2 of the Sherman Act, and Section 2(a) of the Clayton Act (R. 1-20). Insofar as the Clayton Act was concerned, the complaint charged a continuing practice by each of the defendants of selling "fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between such purchasers of fluid milk of like grade and quality," that the effect of the discrimination might be to substantially lessen competition or tend to create a monopoly in such sales, or to injure competition between purchasers knowingly receiving the benefits of such competition and those who did not, and that the discriminations in price "have been granted, often secretly, in the form of preferential * * * discounts * * *" (R. 16-17). The complaint further alleged that, unless enjoined from so doing, the defendants intended to pursue the discriminatory practices (R. 17, 18-19).

In 1953, the district court dismissed the complaint after the government had presented its case. *United States v. Borden Co.*, 111 F. Supp. 562 (N.D. Ill.). It held that the Sherman Act violations charged had not been proved; and that, although there was proof

of price discriminations constituting prima facie violations of the Clayton Act, no injunctive relief was necessary because there was an outstanding injunction in a private antitrust suit which enjoined the defendants from engaging in such discriminatory practices.

On appeal, this Court affirmed the dismissal of the Sherman Act charges, but reversed the dismissal of the Clayton Act charges. *United States v. Borden Co.*, 347 U.S. 514 (R. 26-31). It held (p. 520) that "the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree," and remanded the case for further proceedings.

On remand, the district judge stated, with respect to the Clayton Act issue remaining, that he conceived his primary duty, in the absence of a request for further proceedings, to be to consider whether injunctive relief was required in the light of the decision of this Court in *United States v. W. T. Grant*, 345 U.S. 629, giving due, but not conclusive, consideration to the effect of the consent decree in the private case (*Dean Milk Co. v. American Processing & Sales Co.*, No. 49 C 1159 (N.D. Ill.), entered December 3, 1952) (R. 40). The government on January 11, 1955, moved to reopen the record to permit the taking of additional evidence (R. 45-46), on the ground that the *Dean* decree had not been effective in preventing further price discrimination by the defendants who were alleged to "have engaged in discriminations in price

between different wholesale purchasers of fluid milk of like grade and quality subsequent to the entry of the *Dean* decree" and would continue to do so in the absence of an injunction (R. 46). The court granted this motion by order of April 18, 1955 (R. 47-50).

The case was presented on the basis of stipulations, embodied in pre-trial orders, the depositions of expert witnesses, and written briefs. No testimony was taken before the court. Each stipulation and pre-trial order reserved to the parties questions and issues of the weight, materiality, and relevancy of the data and statements in the stipulations (R. 57, 75, 119, 236, 379, 411, 514). The relevant facts of record as to Borden (which are not disputed except as noted) are set forth below.

THE NATURE OF BORDEN'S BUSINESS

Borden is a New Jersey corporation with its principal offices in New York City (R. 2). Borden and Bowman are the major distributors of fluid milk and fluid milk products in the Chicago metropolitan area. Borden supplies approximately 22 percent of the total sales of all such products in the area (R. 6).

Borden maintains a Chicago Central District Headquarters of which Borden's Chicago Milk Division is a part. The Chicago Milk Division operates four distribution branches, two of which, the Englewood Branch and the Irving Park Branch, served Borden's store customers in the Chicago metropolitan area. Borden's time studies of routemen activities were for routes and activities in these two branches (R. 127, 128).

Of the 1950 wholesale customers served in the Chicago metropolitan area by Borden's Englewood and Irving Park branches during the period of the cost study in July and August of 1955 (discussed *infra*), 1,322 were independent stores, 254 were chain stores and 374 were "non-store" customers (R. 181). During 1954 and most of 1955, Borden served both A & P and Jewel chain store units, but on August 29, 1955 (after the cost study) Borden lost the Jewel account (R. 121). Thereafter A & P was the sole Borden store customer qualifying for the chain store discount.

In 1955, the Englewood Branch operated 57 store wholesale routes, and the Irving Park Branch operated 77 such routes (R. 128). In addition, 133 wholesale customers were also served by "retail routes"² operated out of these branches (R. 128). The assignment of customers to a route and the composition of a route were not dependent on store ownership but were related to a number of factors such as the distance from the Branch, distance between customers, and traffic conditions (R. 139). The number of customers served on a wholesale route showed a wide variance with some routes serving as few as seven customers and others as many as 25 (R. 138-139).

The routes are operated each week day to deliver milk and other products to Borden's various types of customers. There is no physical or functional

² The retail routes primarily served homes and residential customers.

difference in the trucks or instrumentalities used in delivery to the chain stores and the independent stores on any route. Daily deliveries are offered to substantially all customers. However, some stores are not served each day and on occasion more than one delivery is made to a store in one day (R. 138).

THE BORDEN PRICE AND DISCOUNT SYSTEM

Borden adopted a pricing system for fluid milk and fluid milk products based upon an initial classification of all its grocery store customers as either "chain" or "independent". The chain store discount was a fixed percentage discount from list price regardless of quantities or varieties purchased. Independently owned stores received discounts from list price dependent upon volume³ of purchases by each store but

³ Volume was measured in terms of point values assigned to different quantities of each of the various milk products. The assigned "point values" for independent stores were (R. 82):

	Units
Gallons.....	4
1/2 Gals.....	2
1/2 Gal. Zest.....	2
1/2 Gal. Gail Borden.....	2
Qts. Milk.....	1
Skimmed Milk.....	1
Chocolate Drink.....	1
Buttermilk.....	1
Half & Half.....	1
Rich Cream.....	1
Whipping Cream.....	1
Sour Cream.....	1
Cottage Cheese.....	1
Triple & Reddi Wip.....	1
Yogurt.....	1

No points were given for butter, eggs, or bulk products.

in no event as high as that granted to chain stores. During the period from June 1954 through August 1955, Borden granted the chain stores (A & P and Jewel) a flat 8½ percent discount from list prices for fluid milk and fluid milk products regardless of quantities or points purchased (R. 83, 84). During this same period, Borden granted the independent stores a sliding scale of discounts from list prices based on the points purchased by each store, with a maximum discount of 4 percent. The independently owned stores were grouped into four categories which, depending on point volume, received a discount or discounts of 2, 3, or 4 percent, respectively (R. 82).*

The June 1954 discount schedule (which in practice was applied only to independent stores) was published by Borden in an announcement entitled "Borden's Milk Discount Schedule to Grocers" effective June 1, 1954. On its face this schedule was comprehensive of all quantity discounts being offered by Borden to all retail grocery stores irrespective of ownership for "all purchases of Borden's fresh milk products" (R. 82). This announcement and the discount schedule did not contain any statement or indication that higher discounts would or could be secured by independently owned stores on the basis of use or non-use of "optional" or "additional" services related to

* The scaled discounts to the independent stores under the June 1954 schedules were as follows (R. 82):

Average points per day:	Percent discount
0-24 -----	0
25-74 -----	2
75-149 -----	3
150 and over -----	4

Borden's methods of sale or delivery of its products.

Simultaneously with the publication of the June 1, 1954, discount schedule, Borden sent letters dated June 4, 1954, to the Great Atlantic & Pacific Tea Company and to the Jewel Food Stores, respectively, confirming a discount to the chains of $8\frac{1}{2}$ percent effective June 1, 1954, on the purchase by these chains of "milk and certain dairy products in the Chicago area" (R. 83, 84). Both of these letters were signed by Harold Fagerson, Vice President of The Borden Company (*ibid*).⁵

In sum, from June 1954 through August 1955 the maximum discount was granted to all chain stores irrespective of volume purchased while independent store discounts were on a sliding scale computed on average daily point values. No independent store, whatever volume it purchased, could qualify or have an opportunity to qualify for as high a discount as that which Borden was granting to all the chains. Under the pricing system, all the independent customers paid substantially higher net prices than the chains, regardless of the volume of

⁵ In September 1955, Borden revoked the June 1954 discount schedules and went on a net price basis with differentials in net prices to the chain stores and to all independents. The net prices to all independents (R. 84) were substantially higher than the net prices to the A & P stores (R. 86). The differences between the net prices to chain stores and to independent stores for the September 1955 announcement amounted to giving the chains (by this time, only A & P) a discount over the prices paid by *all* independents ranging from $7\frac{1}{2}$ -8 percent. Borden submitted no separate cost justification for this discrimination.

an independent's purchases, and regardless of the fact that deliveries were being made to both chain and independent stores from the same Branches under the same Central office, and on the same routes and in the same trucks by the same drivers.

BORDEN'S PROFFERED COST DEFENSE

The Borden cost defense consists of a two-step process: (A) an elaborate analysis and allocation of direct and indirect costs of sales and delivery of its milk products to (1) its two chain customers (A & P and Jewel) as one class and (2) its independent store customers as another, with the latter group being in turn subdivided into the four discount classifications based upon volume of purchases; (B) on the basis of this analysis, Borden purports to show by four alternative sets of calculations that its discount differentials were cost-justified.

A. *The Allocation of Costs*

By a series of time studies, allocations and calculations, Borden distributed among its chain customers, on the one hand, and each of the four discount classes of independent store customers, on the other,^{*} costs relating to: (1) Routeman's delivery activities, (2) Branch, Main, and District office expenses, allegedly

^{*} Borden's time and expense in serving the "non-store" customers on its wholesale routes was included in the initial calculations of total time and costs. By the same method used to allot elements of time or cost as between "chain" and "independents" as classes, Borden allocated costs between "store" and "non-store" as classes. No separate time studies or calculations were made for wholesale stores served by retail routes.

attributable to the sales of its milk products to wholesale distributors, (3) the costs of solicitor and salesmen activities as related to the independent stores. In addition, Borden allocated a number of miscellaneous costs, such as bad debts and losses on returned products.

(1) *Routeman's Delivery Costs*.—The calculations with respect to the routeman's (milk driver) delivery costs commence with a determination by Borden of the total amount of costs to be allocated. It was determined that the average weekly labor costs of the wholesale route operations amounted to \$29,242.50 (Schedule XXV, R. 170). Of this amount, \$10,148.31, or approximately 35 percent, involved so-called "extra compensation" of the milk drivers, which was paid to the drivers on the basis of the total number of points of fluid milk products which they delivered to the customers on their route (R. 163-166).

This total cost of \$29,242.50 was then distributed between the chains and the independents (and the "non-store" customers) according to a procedure by which the 376,864 minutes, which Borden calculated had been devoted by routemen to all of their activities during a week's test period, were broken down into some 40 work elements (R. 183).

As to each such work element, the calculated costs were in turn allocated between the chains and independents. With respect to 18 of these 40 work elements Borden simply clocked the total amount of time devoted to each in serving the chain stores and in serving the independents of each discount class. This allocation accounted for approximately 200,300 out

of the 376,864 minutes and approximately \$15,540 out of the total of \$29,242 of labor costs (approximately 53 percent). Of this \$15,540, the time study assigned \$6,285 or 40.4 percent to the chains and \$9,254 or 59.6 percent to the independents (R. 183).

The total minutes and cost devoted to the other 22 work elements were similarly derived from a study of the routemen's time. However, with three minor exceptions,⁷ these elements involved indirect expenses which could not be allocated among the chains and independents on a basis of the actual time spent on each. Therefore, the costs which had been assigned to 14 of these 19 elements were allocated among chains and independents on a so-called "location" basis, *i.e.*, on the basis of the number of stores (chain or independent) served by the drivers (*ibid.*). Since Borden's two chain customers during the time of the cost study had a total of 254 stores, whereas there were 1,322 independent stores (and 374 "non-store" customers) (R. 181), the result of allocating costs on this basis was to allocate approximately 67.8 percent of these costs to the independents and 13 percent to the chains. The net effect of allocating these costs on a "location" basis was to assign \$4,412

⁷ Two elements, drivers' time on processing chain store tickets at the branch office and in handling credit matters for chain stores (amounting to \$168 in all), were actually allocated directly to the chains (R. 177) on the basis of time, but listed on Schedule XXVI (R. 183) as being allocated to the chains on a location basis. Similarly one element, drivers' time relating to credit matters for independent stores (amounting to \$13), was actually allocated directly to the independents on the basis of time, but listed on Schedule XXVI (R. 183) on a location basis (R. 177).

in costs to the independents and only \$1,013 to the chains.

Finally, the cost of the time spent on five other work elements, also involving indirect costs, was allocated among the chains on a so-called "stop" basis. This basis of allocation, intended to adjust for the fact that some stores received deliveries on fewer than six days a week whereas a number of others received more than one delivery per day (R. 138), was based on a computation of 2,412 chain store "stops" and 8,395 independent store "stops" (R. 181). The result of the allocation of costs on this basis was to allocate \$3,728 or 65.5 percent of the total costs to the independents and \$1,071 or 18.8 percent of the total costs to the chains (R. 183, 406).

(2) *Office Expenses*.—In addition to these delivery expenses, Borden also purported to allocate that proportion of its clerical salary costs at its Branch, Main, and District offices which it asserted were specifically relatable to the sales of fluid milk products. This process involved time studies to determine the actual breakdown of the time of the office help and that part of it devoted to sales activities (R. 199-215).^{*}

In some few cases (such as the Branch office activities described as "checking and calculating chain

^{*} In the case of the Main and District offices Borden made a further breakdown of these expenses to segregate the costs attributable to the wholesale customers (chain, independents and "non-store" customers) from the expenses attributable to other classes of customers handled by those offices (vendors, handlers and retail (home) deliveries) (R. 209, 210-211).

store tickets" and "checking customer tickets other than chain stores") Borden allocated the derived average weekly costs directly either to the chains or the independents (R. 202). In all other cases, the allocations between the chain stores and the independent stores were made on the location basis, described above (p. 13).

The effect was to allocate \$1,387 to the independents and \$918 to the chains (R. 203, 209, 210, 211, 215).

(3) *Salesmen's and Solicitors' Salaries and Other Miscellaneous Expenses.*—In its cost study Borden listed a number of its expense accounts totaling on a weekly average \$24,974 (R. 137) which covered such items as the salaries of platform men, yardmen, watchmen, and shipping clerks, other miscellaneous salaries, travelling expenses, glass bottle service charges, general sales overhead, and advertising allowances to stores (R. 132-134, 137). Borden's expert stated that it would be proper to allocate all of these elements in proportion to the ascertainable direct costs to individual customers and classifications of customers (R. 135); but in fact no such allocation was made in the original Borden cost study with respect to any of these categories (R. 132). One of the categories, amounting to \$2,066 per week (R. 137), was listed as "Salesmen's and Solicitors' Salaries" (R. 132) and Borden indicated that these salaries covered activities in soliciting the business and serving the

needs and complaints of independent stores only (R. 134). The Borden cost study contained no similar expense account with respect to the salaries for its officials engaged in servicing or soliciting chain accounts, but Borden subsequently estimated that the cost of the time devoted to such activities by these officials and their secretaries amounted to no more than \$359 weekly (R. 620).

In addition, Borden allocated its calculated costs with respect to bad debt losses and the loss on unsold milk products returned by its store customers among its wholesale customers, assigning a total of \$1,139 to the chains for these losses and \$1,004 to the independents (R. 215-216).

B. The Justification of the Discount Differentials

On the basis of these allocations, Borden argued that its discount system was cost justified. It attempted to establish this on the basis of four alternate methods of combining and allocating costs, set forth in Summary Schedules I-IV (R. 585, 597, 605, and 617).

The first of these schedules (R. 585) purported to be a "Cost Justification Based Solely on Direct Costs". There were 11 categories of these "Direct Costs", the major items of which were (1) Routemen's Direct Labor Costs (\$17,065), (2) Branch Office Clerical Salaries (\$2,356), (3) Loss on Returned Products (\$2,214) and (4) Salesmen's and Solicitors' Salaries (\$2,066). The total cost allocated among the chain stores, independent stores, and non-store customers in this schedule amounted to \$24,551, of which \$8,657

were allocated to the chain stores, \$13,881 to the independent stores and \$2,013 to the nonstore customers. The independent store figures were then broken down into the four discount schedule classes with \$1,785 being allocated to the 0% discount category, \$5,306 to the 2% category, \$4,352 to the 3% category, and \$2,437 to the 4% category.

These costs were then compared in each discount class with the total sales volume for fluid milk products attributable to each such class, to derive a cost per \$100 of sales. Since the chains, with allocated costs of \$8,657, had a sales volume of \$195,262 (see R. 217), the cost per \$100 worth of sales in this category amounted under Borden's calculations to \$4.43 per \$100 of sales. Dividing the total sales volume for independent stores (\$98,673, R. 217) into the total allocated costs of \$13,881 for this category, Borden derived a cost per \$100 of sales to independent stores of \$14.07. Considered separately the four independent groups allegedly had calculated costs per \$100 of sales of \$27.24 for the 0% discount group, \$16.05 for the 2% discount group, \$12.12 for the 3% group and \$10.52 for the 4% group.

Borden then subtracted its calculated chain store cost per \$100 from its calculated figure for independent stores as a whole and for each of the independent store subgroups, with the resulting figure constituting, according to Borden, the maximum additional percentage discount which the chains could be granted over that granted to the independent stores in each group. The results of these computations, summarized in Borden's Table 1 (R. 592), purported to show that Borden's chain discount of 8½ percent

was more than justified as to each category of independent store: in the case of independents in the 3% bracket by a margin of \$2.19 per \$100 of sales, in the case of independents in the 4% bracket by \$1.59 per \$100 of sales.

Borden also adduced schedules purporting to cost-justify its differential discounts on three other bases. Schedule II (R. 597) added to the direct cost calculations of Schedule I a number of indirect costs (allocated on a stop or location basis) and major overhead expenses (allocated, in the main, according to the same chain-independent ratio calculated in Schedule I for direct costs) (see R. 600-601). Schedule III (R. 605) left out these overhead costs but added to Schedule I's allocation of direct costs the same indirect costs as in Schedule II (allocated entirely on a stop basis) (see R. 607). Schedule IV (R. 617) deleted routemen's extra-compensation costs (\$10,148), which were paid on a volume basis, from the allocation of the routemen's "direct" labor costs and reallocated this item, together with the other indirect costs, on a volume basis (see R. 614-619).

The first two of these "alternative" methods of allocating costs produced calculated margins of differential costs substantially greater than those resulting from the allocation of direct costs only (R. 602, 608). The last method (wherein the indirect costs and extra-compensation costs of the route drivers, but *not* the direct costs, were reallocated on a volume basis) also resulted in alleged "over-justification". But in this instance, the calculated "over-justification" between chain stores and those independents in the 3 percent

category had been drastically reduced to a margin of only 67¢ per hundred dollars of sales, and the margin between the chains and the independents in the 4 percent volume bracket was reduced to only 46¢ per \$100 of sales (R. 620).

Finally, using the figures from Summary Schedule IV, and adding to chain costs a figure of \$359 per week, which Borden alleged was the total weekly cost of executive time chargeable to store wholesale operations, Borden offered a table (R. 621) which purported to show the cost justification of the 8½ percent chain discount by a margin of 48¢ per \$100 of sales with respect to the independents in the 3 percent volume class, and only 27¢ per \$100 of sales for the independents in the 4 percent discount class.

THE DECISION OF THE DISTRICT COURT

In an opinion which did not distinguish between the Borden and Bowman cost studies, the district court held that the Borden studies sustained its claim that its discriminations in price, which "constitute prima facie violations of Section 2(a) of the Clayton Act" (R. 563), were cost-justified. The court did not undertake any detailed analysis of the Borden cost study or of the government's objections thereto. Instead, adopting "a liberal approach to cost justification studies" (R. 563), the court found (R. 570):

* * * [D]efendants have each made a bona fide effort to allocate their costs between different types of wholesale customers, and that such cost allocation is the sole reason for the alleged price discrimination. I find that the cost

studies provide an adequate justification for the differences in prices described above in defendants' published discount quotations.

Although the court recognized that "the studies are imperfect in some respects" (*ibid.*), it rejected the government's challenges to their validity, since "any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect" (*ibid.*). The court noted the "seemingly arbitrary nature" of the basic classification of appellees' customers into chains and independents (R. 569), receiving percentage discounts "which do not bear a direct ratio to differences in volume of sales" (R. 570). It concluded, however, that "this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores" (*ibid.*, emphasis in original).

Finally, the court stated that it had not given its "stamp of approval to all pricing policies and practices revealed by the evidence * * *. These policies and practices have in many instances been imperfect" (R. 572). But it held that if it were to enjoin such practices it would lead to its complete regulation of this phase of the milk industry and it "would continually be called upon to pass judgment on the pricing practices of these defendants" (R. 571). Finding "such a course [to be] impractical and unwarranted," it stated that "on the basis of the evidence presented" (*ibid.*) the government "is in no way prohibited from bringing these policies and practices to the attention of the Federal Trade Commission, which is, as the Supreme Court has pointed out, a more ap-

propriate tribunal to grant effective relief, if it be warranted" (R. 572).

SUMMARY OF ARGUMENT

The Borden Company adopted pricing policies under which its independent customers received percentage discounts off list price, the amounts of which depended upon the volumes of their purchases, while its two chain store customers received higher fixed discounts, not dependent upon their volumes of purchases. In all cases the chain stores were afforded discounts more than twice as large as those which any independent could qualify to receive. Borden attempted to justify the *prima facie* violations of Section 2(a) of the Clayton Act which these discriminations were found to involve by cost studies which were based upon the same classification of its customers as the discounts themselves. This attempted cost justification does not meet the minimum requirements of the Robinson-Patman Act because the classification of Borden's customers as chains or independents failed to reflect the cost savings involved in serving the largest independent purchasers. These purchasers were restricted to the maximum 4 percent discount granted to all independents in this discount bracket, although Borden's own cost studies suggest that there was a wide difference in the cost of selling the smallest and largest customers in this class. Moreover, Borden's study did not show that there were any cost saving factors involved in selling the customers classed as chains which could not have been realized in selling the largest customers classified as independents. Accordingly, the proffered cost justification should have been rejected.

I

The Robinson-Patman Act amended Section 2(a) of the Clayton Act so as to prohibit any seller in interstate commerce from discriminating in price between purchasers where competition might be adversely affected unless the price differential makes only due allowance for certain described cost differences. Both the clear wording of the amendment and the legislative history of the provision indicate plainly that a price differential can only be justified by a showing of cost differences of approximately equal amount which flow directly from the method or quantities involved in dealing with the purchaser.

Where a seller deals with a very large number of customers practical considerations may make appropriate the establishment of defined classes of customers and the promulgation of prices for each class which reflect the cost savings necessarily involved in dealing with its members. Unless the classes of favored or disfavored customers are appropriately defined, however, the resulting price structure may lead to substantial and unjustifiable discrimination against individual members of the disfavored class of customers and may result in the destruction of price competition among the seller's customers.

The minimum requirement for an appropriately defined class of customers is that membership in a favored class be solely determined by the presence or absence of those differences in method or quantity of dealing which substantially account for the cost savings accruing to the seller. If membership in a favored class of customers is determined either (1) in

terms unrelated to differences in method or quantity of dealing or (2) in terms of differences in method or quantity which fail to explain the alleged difference in cost of dealing with the individual members of the class, its use to determine or to justify prices will necessarily result in an unjustifiable discrimination against purchasers whose quantities or methods of dealing involve the same substantial cost saving factors which justify the low price granted the favored class.

II

The Borden cost study is based upon a comparison between the cost per \$100 of sales of serving the stores of its two chain customers and the cost per \$100 of sales of serving each of four broad categories of independent stores. It is not and cannot be based upon differences in quantity of purchases between individual independent store customers and the chain store customers, for even independent stores purchasing larger volumes of Borden's products than the average store of a particular chain are, under Borden's pricing system, only eligible for a discount which is less than one-half as great as that automatically afforded to both of Borden's chain customers. Nor can the classification properly be based on any uniform and inherent difference or differences between the methods in which Borden sells or delivers to chain stores and the methods by which it sells or delivers to independent stores. The alleged differences in method suggested by Borden either are not in fact differences in method of sales or delivery,

or have not been shown to result in differences in cost of dealing, or are not distinctions between all chain customers and all independent customers. Even if it be assumed that one of these asserted differences involves a real distinction in Borden's method of dealing with all of its chain store customers as contrasted with its methods of dealing with all of its independent customers (and a plausible case for such a distinction can only be made with regard to one of Borden's asserted differences), this difference relates to a cost factor which demonstrably could not account for more than a fraction of the actual difference in discount prevailing under Borden's pricing policies.

There are substantial discriminatory effects of Borden's procedure of lumping a large number of widely varying independents into one group and then using the average cost of serving the group as the basis for determining the price discount to which each individual independent is entitled. The large independents in the highest discount group, with volumes ranging to over three times the group average, are denied the benefits of the cost savings resulting from the fact that they purchase quantities and, in all probability, are served by Borden with methods in all material respects similar to those used by the chain stores which receive twice as large a discount. The Borden discount system thus effectively precludes any large independent store purchaser from competing on equal terms with its chain competitors, even if the costs per unit of sales of dealing with such a store are not greater than the costs per unit of sales of dealing with the chains.

There is, moreover, no way in which an independent can change its quantity or method of dealing in order to obtain a price which is competitive with that charged a rival chain store. There can be no doubt that the Robinson-Patman Act was intended to and does forbid any such discrimination in price which does not merely make "due allowance" for differences in methods and quantities of sales and delivery between two individual purchasers.

III

Contrary to the belief of the district judge, adequate equitable relief would not involve a continuing and complex regulation of one segment of the economy, but would require only the simplest form of injunction—a prohibition of Borden continuing to charge different prices to different classes of customers on the basis of form of ownership or on any other basis not substantially related to the cost savings realized in dealing with the members of the class.

ARGUMENT

The proviso of Section 2(a) of the Robinson-Patman Act allows as a justification for a price differential a showing that the differential makes only due allowance for cost savings resulting from different methods or quantities of sale or delivery. Under the Borden price-discount system, Borden awards its chain-store customers a discount which is more than twice as large as that which is available to any independent store, although a particular independent may purchase greater quantities of milk products than the average chain store and although Borden's meth-

od of dealing with the two stores may be identical in terms of any factors which could justify the marked differences in discounts between the two customers. The question presented by this case is whether this discrimination in price between similarly situated customers can be justified by placing each of the customers into a different class and then attempting to show that it costs less to deal with the "average" member of one class than with the "average" member of the other class.

I

THE STATUTE BROADLY PROHIBITS ANY PRICE DIFFERENTIAL BETWEEN CUSTOMERS THAT IS NOT DIRECTLY AND IMMEDIATELY RELATED TO A SIMILAR COST SAVINGS

Section 2(a) of the Clayton Act, 15 U.S.C. 13(a), as amended in 1936 by the Robinson-Patman Act, 49 Stat. 1526, prohibits a seller engaged in commerce from discriminating, either directly or indirectly, in price between different purchasers of commodities of like grade and quality, where the effect of such discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them." It provides, however, that:

* * * nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

The cost defense proviso of the amended Section 2(a) was a substitute for a proviso of the original Clayton Act which had made a mere difference in the quantity of the commodity sold a defense to a charge of price discrimination. 38 Stat. 730. The new language was deemed to be of "great importance," for while it permitted "the adoption and use of more economic processes of manufacture, methods of sale and modes of delivery," it "also limits the use of quantity price differentials to the sphere of actual cost differences. Otherwise such differentials would become instruments of favor and privilege and weapons of competitive oppression." H. Rep. No. 2287, 74th Cong., 2d Sess., p. 9; see S. Rep. 1502, 74th Cong., 2d Sess., p. 5.

The reconciliation of policies accomplished by the statute's prohibition and its cost defense is clear. Competition was to be protected by the prohibition of price discrimination, yet customers were not to be denied by the statute the benefits of the economies and efficiencies that were uniquely involved in sale and delivery to them. The limits of a cost defense follow logically from this reconciliation of purposes. The Senate Report indicated that the bill "limits the differences in cost which may be honored in support of price differentials, to those marginal differences *demonstrable as between the particular customers* concerned in the discrimination" (emphasis added). It added that the bill was designed:

* * * to leave the test of a permissible differential upon the question: [I]f the more favored customer were sold in the same quantities and by the same method of sale and

delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same? * * * [S. Rep. 1502, 74th Cong., 2d Sess., p. 6.]

In sum, a price differential can only be justified by a showing of a cost difference of approximately equal amount which flows directly from the method or quantities involved in dealing with the particular purchaser.

II

THE USE OF CLASSES OF CUSTOMERS IN ESTABLISHING A COST JUSTIFICATION FOR DISPARATE PRICES IS CONSISTENT WITH SECTION 2(a) ONLY IF THE CLASSES ARE CREATED AND DEFINED IN TERMS OF FACTORS WHICH SUBSTANTIALLY ACCOUNT FOR THE DIFFERENCES IN THE COST OF SERVING THE INDIVIDUAL MEMBERS OF THE CLASSES

A. Read literally, the language of the statute and of the Senate Report seems to forbid any differential pricing between any two customers unless that difference is individually justified by a showing of a similar difference in cost of manufacture, sale, or delivery between the same two customers. As a matter of practical necessity, however, when a seller deals with a very large number of customers, he cannot be required to establish different cost-reflecting prices for each customer. The seller must be permitted to establish appropriately defined classes of customers and to promulgate prices for each class which reflect the cost savings necessarily involved in dealing with that class.

It has therefore become accepted practice for sellers to establish prices and, as a correlative, to cost-justify

discriminatory prices by a two-step process. First, the seller establishes appropriately defined classes of customers. Second, the seller attempts to prove that its quantities or methods of dealing with each of these classes differ in ways that result in a cost difference similar in amount and direction to the difference in price charged the classes. However, the use of classes of customers need not be and, of course, should not be an excuse for treating differently any two or more customers who deal with the seller in the same quantities and with the same methods. The mandate of the Robinson-Patman Act remains that a difference in price is not cost-justified unless it makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which" the goods are sold. And no difference in cost can result from identical methods or quantities of dealing.

B. Unless a seller carefully and appropriately defines the membership of favored and disfavored classes of customers, an apparently justifiable price structure may result in substantial and unjustifiable discriminations against individual members of the disfavored classes of customer and in the destruction of price competition among the seller's customers. Recognizing these dangers of discrimination inherent in improper categorization of customers, the Federal Trade Commission has, in a series of cases, established the requirement that the individual purchasers assigned to any one group for cost-justification purposes must be substantially related in terms of those factors

which determine the cost of manufacture, delivery, or sale. See *Curtis Candy Co.*, 44 F.T.C. 237, 267-268; *International Salt Co.*, 49 F.T.C. 138, 153-155; *Champion Spark Plug Co.*, 50 F.T.C. 30, 43; *Thompson Products, Inc.*, 3 Trade Reg. Rep. (FTC Complaints, Orders, Stipulations 1959-1960) ¶27,841. While the enforcement of the outer limits of this requirement of a price class which is homogeneous in terms of significant cost factors involves the exercise of the judgment and discretion of the trier of facts, recognition of the minimum content of the requirement involves a matter of law which can be derived from the wording and purpose of the statute.

This minimum requirement can be stated in either of two very similar ways: (1) The Robinson-Patman Act, which was designed to prevent price discriminations between similarly situated customers, does not authorize the use of classes of customers to justify price differentials unless membership in a favored class of customers is available to any customer whose method of dealing with the seller involves substantially the same cost-saving aspects which justify giving a special price to the favored class. Otherwise a defense against one price discrimination becomes an authorization for another discrimination. (2) The granting of lower prices to a favored class of customers necessarily involves price discrimination unless the membership of that class is determined solely by the presence of substantial cost-saving elements in dealing with the members of the class. For to define the membership of a favored class of customers in any other way is necessarily to authorize an unjustifiable

discrimination between the members of that class and other customers who deal in the same cost-saving way that is recognized in the class price. No requirement of convenience justifies a seller in using a classification system which, from the beginning, authorizes an unjustifiable discrimination between customers who deal alike with the seller in all material respects.

There are thus two considerations of major importance to the purposes of the Robinson-Patman Act which require a rule which permits classifying customers for purposes of cost justification only where the seller uses open-ended classes of customers defined *solely* in terms of significant cost factors:

(1) Only the definition of favored classes of customers in terms of cost-saving aspects of the method or quantities of dealing with each class provides a minimum guarantee that the selection of classes will not be used as a device to accomplish the very type of price discrimination that the Act was intended to forbid. A simplified example can best illustrate the harm of departure from this standard. Suppose a seller, X, incurs the following costs per unit sold in dealing with nine different customers:

Customer	Cost-saving factor	Cost of delivery per unit sold
A.....	Absent.....	14¢
B.....	Absent.....	13¢
C.....	Absent.....	12¢
D.....	Absent.....	10¢
E.....	Present.....	6¢
F.....	Present.....	4¢
G.....	Present.....	4¢
H.....	Present.....	5¢
I.....	Present.....	7¢

If X, for purposes of cost justification, divides his customers into two groups, A through G in one group and H and I in the other group, a price difference of 3¢ between the two groups will superficially appear justified, for the average cost per unit sold of delivery to customers A through G is 9¢, while the average cost of delivery to H and I is 6¢. If the process of classification is accepted, so is a price three cents lower for I than for E, F, or G, when in fact sales to F and G are 3¢ cheaper per unit and sales to E are 1¢ cheaper.

It is important to note that in this hypothetical example, as in the present case, the seller, X, might well be able to establish that there is a cost-savings factor (such as a particularly economical method of delivery) which is present in dealing with H and I and absent in dealing with the *majority* of customers A through G. If this is a sufficient showing of the reasonableness of the classification, then X will be permitted to charge E, F, and G 3¢ more per unit than H or I—even though the identical cost-savings factor is present in sales to all five customers. This would be discrimination *not* justified by the Act. Only if X is required to define its categories of customers in terms of the presence or absence of factors substantially relevant to the determination of X's cost, will X be effectively prevented from discriminating between similarly situated customers.

(2) Only a definition of classes of customers in terms of the substantial cost factors which are present or absent in the parties' dealing avoids permanently freezing a competitive inequality at the customer level, to the inevitable detriment of competition.

Even if it were shown that there had always been a certain cost saving factor in dealing with each member of a particular group of customers—for example, chain grocery stores—compared to the customary methods and costs of dealing with all members of another group such as independents, the creation of a continuing price differential based on whether or not a grocery store belongs to a chain rather than on the presence or absence of the cost-saving factor would be contrary to the requirements of the Robinson-Patman Act. An independent store which found itself unable to compete with a neighboring chain store would be effectively precluded from obtaining the lower price paid by the chain store even if it undertook to change its method of dealing so that its supplier could realize the same cost savings as in dealing with the chain store.

Only a definition of a price class in terms of the significant services its members require provides a framework within which a disfavored customer can, by changing his method of operation, obtain the lower prices available to his competitor. Without such an open-ended method of classifying customers a supplier's disparate prices will inevitably freeze out any future attempt at price competition between members of different classes of customers.

C. Proper definition of a class for one purpose in terms of a cost saving does not, in itself, mean that the classification can be utilized for allocating all costs between the purchasers so grouped. Specifically, it is not enough to show that in respect of some particular

quantity or method of dealing a number of purchasers properly fall into one of two groups and then to proceed to analyze all the costs of serving the two groups of customers on the basis of this classification. Before a single classification of customers may be utilized to determine all the costs of serving the individual members of each group, it must be demonstrated that the classification has been defined in terms of cost factors which substantially explain and justify the amount of the lower cost charged the favored class. Otherwise a classification based upon a factor of only marginal importance, which in no sense truly justifies the extent of the price differential between the seller's customers, could result in a statistical "justification" of substantial discriminations.

A minor variation on the hypothetical example just given (*supra*, pp. 31-32) illustrates the importance of requiring that the cost-saving factors used to define a favored class must be substantially related in terms of cause and amount to the difference in cost which is used to justify allowing a lower price to the favored class of customers.

Customer	Cost-saving factor #1 (Involves a saving of 7¢ to 9¢)	Cost-saving factor #2 (Involves a saving of 2¢ to 4¢)	Cost of delivery per unit sold
			<i>Cents</i>
A.....	Absent.....	Absent.....	14
B.....	Absent.....	Absent.....	13
C.....	Absent.....	Present.....	12
D.....	Absent.....	Present.....	10
E.....	Present.....	Absent.....	6
F.....	Present.....	Present.....	4
G.....	Present.....	Present.....	4
H.....	Present.....	Absent.....	5
I.....	Present.....	Absent.....	7

This example uses the same cost of delivery per unit sold as in the original example but is modified so as to show that the differences in cost per unit are attributable to the presence or absence of each of two cost-saving factors, one of which is of several times the importance of the other. If the seller, X, were allowed to create two classes of customers defined solely in terms of the less important cost-saving factor (#2), he could place A, B, E, H, and I in one class with an average cost of 9¢ and C, D, F, and G in the other class with an average cost of 7½¢. The result would be to justify charging E, H, and I 1½¢ more per unit than C is charged although the seller's cost of dealing is 6¢, 7¢, and 5¢ less, respectively.⁹

In sum, a difference in quantity or method of dealing which does not substantially account for and justify the over-all cost and price differentials between two classes of customers provides a scarcely less arbitrary method of classification than the random selection of favored customers and results in similar

⁹ It is important to observe that the discriminatory effects are no less certain if the seller, X, establishes a single class defined by requiring the presence of *both* the insignificant cost-saving factor (#2) and a significant cost factor (#1) (as Borden may have done in the present case). F and G, the only two purchasers in the favored class, would then have an average cost of 4¢, while the average cost for all the other purchases would be more than 9½¢. X would therefore be authorized to charge F and G a price 5½¢ less than he charges E, H, or I although his cost savings are only 2¢, 1¢, and 3¢, respectively. This discriminatory result, which appears cost-justified "on the average", is wholly unjustified in terms of actual costs and results in a destruction of competition among five of the nine hypothetical purchasers.

unjustified discriminations between the seller's customers.

III

BORDEN'S CLASSIFICATION OF CUSTOMERS AS CHAINS OR INDEPENDENTS WAS BASED UPON NO DIFFERENCES IN THE METHOD OR QUANTITY OF SALES OR DELIVERY WHICH CAN JUSTIFY THE DIFFERENTIALS IN DISCOUNTS

A. The underlying assumption of Borden's detailed and elaborate cost studies is radically different from that of the government. Borden assumed that, if two or more groupings of customers were set up and there was some basis for believing that the general or "average" character of the groups differed, a cost justification of a price differential between every member of one group and every member of the other could be established by showing a differential cost per \$100 volume of sales to each class. It therefore set up classes of independents and chain stores; pointed out in a general fashion that even the class of larger independents differs widely from the class of chain stores in average volumes and that different and more costly methods of sale or delivery are used for the "average" independent than are used in dealing with the chains; clocked and calculated the total time and cost spent in dealing with the two categories; and determined that the average cost per \$100 of volume of dealing with the chain stores was a certain amount less than the cost of dealing with the larger independents (and, *a fortiori*, the other classes).

It is the government's contention, argued fully above, that an individual purchaser is entitled to the same treatment by a seller as his competitor unless

it can be shown that the volume of his purchases or his methods of purchasing and accepting delivery from the seller differ from his competitor's to a degree warranting a given price differential. The Robinson-Patman Act does not authorize customer-to-customer discrimination whether or not there is discrimination between the *average* members of the classes of customers in which each of the customers is put by the seller; for it explicitly forbids *any* discrimination between different purchasers which does not merely make due allowance for differences in cost "resulting from the *differing* methods or quantities in which such commodities are to *such* purchasers sold or delivered" (emphasis added). In short, it is the government's contention that only classifications of customers in terms of those differences in quantity or method of dealing which substantially account for the lower price to the individual members of a particular class can ever be the basis for a pricing policy or a cost justification.

B. Unquestionably a distinction between chain stores and independent stores, as such, is not a classification in terms of significant cost factors of quantity or method of dealing. Moreover, it is plain on the face of Borden's discount schedules that Borden has not created open-ended classifications of customers in terms of the quantities and services they require. For there is no way that an independent store can obtain as much as one-half the discount allowed every chain outlet regardless of the quantities the independent purchases and regardless of its willingness

to use the identical methods of sale and delivery that Borden furnishes the chain stores.

Although these facts alone, in the government's view, show that Borden's classification of customers cannot provide the basis for a valid cost justification, it is worth considering in detail Borden's contention that its classification is "really" not in terms of chain versus independent ownership but in terms of certain distinctions in quantities and methods of dealing with the members of each class. (Motion to Affirm, pp. 8-11.)

1. A number of the differences in quantity and method of dealing advanced by Borden (*id* at pp. 14-16) go only to "average" or "general" differences of the classes and do not purport to involve characteristics which are the same in all the independents and uniformly different in all the chain stores. In the government's view these "average" differences cannot justify treating a "non-average" independent differently from the chain stores.

(a). First, it is entirely clear that Borden's distinction between chain stores and independents cannot be justified as reflecting the greater quantity purchased by the average chain store¹⁰ compared to the quan-

¹⁰ Among the contentions made by the government below, but not resolved by the district court, was the argument that, where an independent store is in competition with a particular store of a chain taking a volume of purchases less than the average for that chain's stores, the independent is entitled to secure a discount proportional to the costs of serving it as contrasted with the costs of serving the individual chain store, rather than a discount proportional to a higher "average" cost of serving all stores in the chain. The government is willing

tity purchased by *each* independent. The record does not and could not show that every independent purchases in smaller quantities than the average chain store. One example of an independent which purchases substantially larger quantities than the average chain store is the Schubert store at 2610 W. 71st Street, Chicago, which had a dollar volume of purchases for December 1954 of \$4,083 (R. 80). Since the average monthly volume of purchases for the 80 largest independent stores was approximately \$1,255 (R. 217),¹¹ Schubert's volume was about $3\frac{1}{4}$ times the average. Expressed in points, this means Schubert took an average of approximately 750 points daily, as contrasted with the 231-point average for the 80 stores. This was well above the chain average of 599 points a day (R. 410) and meant that to the extent the discounts were based upon quantity savings Schubert should have received a substantially greater discount than either chain customer. Under the Borden discount scheme, of course, it did not,

to assume, for purposes of this argument, that the proper volume figure to be used in comparing a chain with its independent competitors is the average volume purchased by the stores of that particular chain.

¹¹ This figure is calculated by multiplying by four the weekly purchase figure given in Schedule XXXIV (R. 217) for all independents, and adding an amount for two extra days of sales, to secure a total monthly volume for all independent stores in the 4 percent category, and then dividing by 80 to get the average.

for no independent store could obtain even comparable discounts.¹²

(b). Borden alleges that a large majority of "independent" customers pay cash for each delivery and that this is more expensive than the centralized billing of the chains. If Borden wishes to make an additional charge to those independents which either want to pay cash or, because of a poor credit rating, can reasonably be made to pay cash, such a charge is, of course, perfectly proper. What Borden may not do is what it has in fact done—charge independents which have excellent credit and which do not make cash payments a greater amount than a competing chain store simply because the majority of independents pay cash.

(c). Borden alleges that all bad debt losses from store customers have been incurred by extensions of credit to independents. But (i) it is clear that the cost of bad debts is not applicable to the vast majority of independents; (ii) the total amount of bad debts charged to the larger independents—\$1.90 weekly,

¹² In its Motion to Affirm, Borden pointed out that the record indicates that Schubert and two other independents on its route (both of whom purchased an amount of Borden's products which was about average for stores in the 4 percent bracket (see R. 80)) actually received discounts of 5½ percent, 1½ percent above the normal maximum according to Borden's published discount schedule (R. 82). This extra discount was given the three stores by Borden to meet competition (Government's Post Trial Brief, p. 12 (not printed)), and thus does not demonstrate that Borden adjusted its published discount offers where cost savings to individual purchasers so dictated. In any event, at its volume level Schubert was entitled to at least the same 8½ percent discount given the chains, and its receipt of 5½ percent was not cost-justified.

R. 585—(or even to all independents—\$31.42 weekly, R. 585) by Borden is so infinitesimal compared to their volume of purchases¹³ that there can be no good faith reference to it as a significant factor in classification; and (iii) the cost of bad debts does not result from differing quantities and methods of dealing, as the statute requires.

(d). There are two other alleged differences in method of dealing which involve only "average" differences and not actual differences between each of the members of each class. The "tendency" of chain stores to be more concentrated in areas of denser population than independents (thus allegedly reducing truck traveling time) obviously cannot justify a classification by type of ownership; many independents will also be in areas of dense population. And the assertion that the independents generally required that deliveries be made to places in their stores less accessible than those areas to which chain store deliveries were made (an analogue of Bowman's "customer services" categorization) is meaningless as justification for a classification in view of the fact that Borden does not claim that all independent stores, because of the nature of their ownership, require deliveries to more inaccessible places than the chain stores, but only that this extra delivery expense is more characteristic of the independent stores as a group than of chain stores (R. 173, 404).

¹³ The total volume of purchases by the eighty largest independents during the same period was \$23,167. For all independents it was \$98,672 (R. 585).

2. Three other differences in method of dealing advanced by Borden (Motion to Affirm, pp. 15-16) are unsupported by any showing that the differences resulted in significantly different costs in dealing with the two classes.

(a). Borden notes that the billings of the chain stores which deal on a credit basis are serviced centrally, while those of the independents using credit are handled by the delivery men. However, no evidence was adduced to show: (i) that the latter method of collecting on credit accounts was inherently more costly; (ii) if so, why the cheaper method was not also used with the independents; and (iii) what the extent of the difference was.

(b). Borden contended that in the case of independents the routemen computed at the store the quantity and price of each product purchased and entered it on the sales ticket, whereas for chains only the quantity was entered, with the price being entered as part of a central billing operation (see R. 174). Again, however, there was no evidence introduced that: (i) for a given volume of goods the method for dealing with the chains was any less costly to Borden than the method of dealing with the independents; (ii) if so, why the cheaper method was not also used with the independents; and (iii) what the extent of the difference was.¹⁴

¹⁴ In any event, the difference could not have been material since the total weekly difference between the chains and independents for *all* sales ticket operations performed by the routemen was only \$680 (Item 14, R. 183). Weekly costs of the central office billing department, on the other hand, involved charges of \$356 to the chains and only \$42 to the independents (R. 205, 209).

(c). Also falling within this class is the unsupported testimony of a witness for Borden that in his opinion the Borden executives spend proportionally more time on the problems of independent stores "than the sales to such stores bear to the sales to chain stores" (R. 144).

3. One difference in method of dealing remains which is not entirely disposed of by either of the above two objections. Borden notes that the soliciting and servicing of its independent store customers is done by its employees hired for this task, whereas the same function for the chains is performed by higher executives. For two reasons this distinction cannot justify the categorization of Borden's customers into a chain class and an independent class.

(a). There is no showing of any necessity for this internal division of labor. If, as there is every reason to assume, large independents could be serviced in precisely the same way as the chain stores, it is not a cost justification to show that, as a matter of the seller's choice, they are serviced in a more costly way.

(b). Borden allocated \$2,066 per week to salesmen's salaries for all the independents and \$487 for the larger independents alone (R. 617); it made a corresponding allocation of \$359 for the cost of the time of higher officials performing similar services for the chains. Even if it is assumed, however, that the differences between these sums in fact represent the weekly differentials in the cost of dealing with Borden's classes of customers resulting from a difference in the method of solicitation, this difference in method would account for only about two-fifths of the calcu-

lated difference between serving Borden's chain customers, as a class, and the 80 largest independents, as a class. It therefore could not properly be used as a basis for a classification which purports to justify the much larger differential between the classes (see *supra*, pp. 33-36). This is particularly true where the classification at the same time conceals the real differences in volumes between the individual members of the disfavored class.¹⁵

C. Borden thus failed to comply with the implicit statutory requirement that classes of customers be defined solely in terms of those differences in method or quantity of dealing which account for the difference in cost between the two classes. This is not merely a technical failure; it results in substantial unjustified discriminations among Borden's customers.

With minor exceptions, Borden made no attempt to explain or assess the importance of the various differences in quantity or method of sale among its customers. It is reasonable to conclude, however, that the greater part of any cost savings involved in dealing with the chains resulted from increased volumes of purchase and from such "method" differences—which are related to volume—as the necessity of stacking merchandise in a store icebox (R. 173,

¹⁵ Thus, as to Schubert, which had a volume of approximately $3\frac{1}{4}$ times the average of independents in the 4% discount bracket, this factor, by itself, would account for only about one-eighth of the discount differential between the chains and the largest independent discount bracket. This differential would be outweighed to the extent that Schubert's greater volume than the average chain store results in other cost savings.

183). By lumping the largest 80 independents into one class Borden guaranteed that those very large independents whose quantities and methods of purchase and delivery approximated that of the chains were being charged with a proportion of the extra costs attributable to the small independents whose different quantities and operational methods involved extra costs to Borden. In this regard it is particularly significant that Borden, which had three volume categories for independents below a 150 point daily average, had only one discount category above 150 points, although average daily volumes of customers in this last category differed by at least 600 points (see *supra*, p. 39).

This point can perhaps best be illustrated by examining one of the comparisons adduced by Borden to show that alleged "differences" in the methods and "'quantities' by which [its] milk was purchased [by the chains on the one hand and the independents on the other] resulted in conspicuous differences in cost of sale and delivery" (Motion to Affirm, p. 16). Borden referred to the fact that it took its drivers 11,538 minutes to carry the milk from the trucks to the designated delivery points in the chain stores, 12,709 minutes in the case of all independent stores, and 2,041 minutes in the case of the 80 independents in the 4 percent discount category (*id.* at 17). Borden pointed out that according to these figures it took less time to perform this task for the 254 chain stores than for the 1,322 independent stores, despite the fact that the chains purchased about twice as much milk products as the independents (*ibid.*). It also showed that, though aggregate sales to the two chain customers

were 8.4 times the sales to the 80 independents in the 4 percent discount category, the time spent on this activity in the chain stores was only 5.6 times that spent in the 80 independent stores (*ibid.*).

The Borden example shows that substantial cost savings resulted from quantity dealing, but it also shows that the larger independents were precluded from taking advantage of such savings as their volume purchases might have entitled them to if their volumes had been compared directly with that of an average chain store. By lumping the largest 80 independents together, Borden treated a store such as Schubert, which took a volume of approximately 750 points, as if it took the class average of 231 points. Moreover, a large independent such as Schubert was forced, regardless of its own operational techniques, to bear a substantial share of the extra costs Borden incurred in dealing with much smaller independents whose methods of dealing were more costly. Specifically, under the Borden analysis, the large Schubert store and other independent supermarkets could take their deliveries at an outside rear platform, as presumably most of the chain stores did, and yet be charged with an additional sum arising out of an "inaccessibility" factor, because other independent stores in their group required time-consuming inside delivery.

As a dramatic example of the unfairness of the broad groupings into which Borden classified the independents, Schubert is undoubtedly not typical. But there are almost certainly other large independents who also were entitled on a quantity and method basis to discounts which, if they did not equal that

granted the chains (or earned by the individual chain customers), at least amounted to percentage discounts closer to that granted the chains than the spread between 4 percent and $8\frac{1}{2}$ percent which actually existed.

It is no answer to this argument to point out that, if some of Borden's large independent customers would have gained as a result of being given individual treatment, others would have been worse off. The Robinson-Patman Act amendments to Section 2 of the Clayton Act prohibit discrimination between "purchasers" of like goods, not between classes of purchasers, and the cost-defense proviso is similarly geared to the rights of individual purchasers to be protected from discriminatory pricing unless the discrimination can be cost-justified by distinctions between their individual sale and delivery characteristics and those applicable to their favored competitors.

Finally, Borden's lumping-averaging process also introduced an element of distortion at the chain level. On this record there was no basis for classifying the two chain customers together, for there was no showing that the average A & P and Jewel stores purchased substantially equivalent amounts of milk.¹⁶ The only material evidence on the point indi-

¹⁶ Borden attempts to surmount such deficiencies in its proof of its cost justification defense, by pointing out that the raw material for its cost study, consisting of the report forms from its time studies of its various functions were assembled in a series of "bulk" exhibits made available to the government and the court below (Motion to Affirm, p. 28). The government, it suggests (*ibid.*), could have derived from this source the necessary information to calculate the differences in average

states that, on the contrary, the average Jewel store purchased about 32% less milk than the average A & P store.¹⁷ Thus, to the large extent that Borden's cost justification is based upon the claim that there are cost savings in sales and deliveries to customers whose stores take relatively large volumes of Borden's goods, it is clear that the large discount differential between Jewel and the bigger independents was further exaggerated.

In sum, Borden's cost savings largely resulted from the efficiencies of dealing in large quantities and the economies of allowing large grocery stores to do many

volume between the A & P and Jewel stores, or between volumes and methods of sale and delivery of particular independent stores to determine whether in fact the classification discriminated against particular purchasers. We think it clear that a party may not seek to cost-justify its discriminatory pricing policies on one basis, and then, when this is found to be inadequate, argue that the government had the burden of showing that no facts in the record might conceivably cost-justify the discrimination on some other basis.

¹⁷ Schedule XXXVI of the Final Pre-Trial Order as to Borden (R. 519) indicates that there were 256 chain stores served by Borden in 1954, the last full year in which it had both A & P and Jewel as customers, and that it served only 112 chain stores in 1956, the first full year it served only A & P among the chains. The schedule also shows that, figured as a percentage of the 1947 volume of chain store purchases, Borden's chain store volume in 1954 was 192.2 percent and in 1956 only 97.5%, slightly more than half as much. This would indicate that the *aggregate* volumes of sales by Borden to A & P and Jewel were "of the same general order of magnitude" (Borden Motion to Affirm, pp. 28-29). But since Borden was serving approximately 145 Jewel stores in 1954 and only 110 A & P stores, the *average* A & P store would be taking about 32 percent more of Borden's milk products than the average Jewel store.

of the sale and delivery tasks that Borden performed for smaller stores. Borden could, if it wished, charge a single price to all stores regardless of these cost savings in dealing with some. But if it wished to recognize these cost savings in a price discount system, it had to do this with a price schedule which applied equally to every customer, regardless of form of ownership, and which determined each individual customer's discount in terms of the efficiencies and economies which give rise to Borden's cost savings.

If Borden had done this, its price schedule would have shown, instead of a leap in discount from 4% to 8½% dependent upon form of ownership, a gradation in discounts properly reflecting the actual economies, efficiencies, and cost savings involved in dealing with individual customers who are grouped together only in the costly benefits they enjoy and who are free to exchange some benefit of service for a lower, more competitive price. Only this type of schedule for price differentials is permitted by the Robinson-Patman Act, for this type alone makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchases sold or delivered * * *."

IV

A SIMPLE DECREE FORBIDDING ANY DIFFERENCE IN PRICE BASED UPON WHETHER A STORE IS INDEPENDENTLY OWNED OR BELONGS TO A CHAIN WOULD EFFECTIVELY REMEDY THE VIOLATION OF SECTION 2 (a)

The District Court was incorrect in assuming that an appropriate injunctive decree would require it to

"regulate this particular phase of the industry" and would mean that the court "would continually be called upon to pass judgment on the pricing practices of these defendants" (R. 571). As the substance of the government's argument makes clear, the illegal discrimination practiced by Borden resulted from its use of a broad classification of chains and independent stores to allocate all the costs of the two classes when only a small part, if any, of the resulting differential in cost resulted from inherent differences in the quantities or methods of dealing between the members of the two classes. An appropriate decree would forbid the determination of price in terms not substantially related to the cost of dealing with each particular customer. Tailored to the present case, the necessary decree would simply enjoin the appellee from adopting or giving effect to any price or discount policy based upon a classification of its customers into chain stores or independent stores.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed and the case should be remanded to the district court with instructions to enter a judgment holding the appellee Borden Company to have violated Section 2 of the Clayton Act in its price discount practices and policies which were the subject of the hearing on remand and enjoining Borden from adopting any price or discount policies based upon a classification of its customers into chains and independents.

Respectfully submitted.

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MARCH 1962.